LSTA
THE LOAN SYNDICATIONS AND TRADING ASSOCIATION®

SIFMA
Securities Industry and Financial Markets Association

February 1, 2010

09-BK-026

BY FEDERAL EXPRESS AND E-MAIL

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: *Proposed Amendment of Federal Rule of Bankruptcy Procedure 2019*

Dear Mr. McCabe:

The Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") appreciate this opportunity to comment on the proposed amendment to Federal Rule of Bankruptcy Procedure 2019 ("Proposed Rule 2019"). Both the LSTA and SIFMA understand and appreciate the painstaking efforts your Committee has made to amend Rule 2019 to address legitimate interests and concerns. The comments and suggested revisions set forth below are offered in the spirit of trying to improve upon the work your Committee has performed. We very much hope that the perspective that the LSTA and SIFMA bring to this issue will be of assistance to the Committee.

Executive Summary

Proposed Rule 2019 satisfies legitimate disclosure concerns by requiring each holder in a group (or, if the court so requires, a party in interest acting separately) publicly to disclose the nature and extent of its economic interests in the debtor. Those disclosures of economic interests would include short and "synthetic" positions, including rights under derivative instruments.[1] (All such economic interests, including but not limited to bank debt, bond debt and trade claims, whether such interests are debt or equity, actual or synthetic, long or short, and including all derivative instruments, are referred to herein as "Bankruptcy Claims".) The LSTA and SIFMA support the amendment to the extent it would require those disclosures that will enable the bankruptcy court, the debtor and other parties in interest to not only appreciate how large the group's collective voice looms in the restructuring process, but also to understand how "long" the committee members truly are, on a net basis, in their holdings.

Proposed Rule 2019, however, goes beyond these practical and necessary requirements because it would compel public disclosure of a party's most confidential and proprietary information: the date and price at which that investor purchased (and/or sold) its Bankruptcy Claims. While Proposed Rule 2019 purports to provide a safeguard with respect to the disclosure of the price paid in a transaction by requiring that the court must direct such disclosure, the protection provided by this safeguard is illusory. So long as one knows the date of the purchase or sale—and, again, disclosure of the date of the transaction is mandatory under Proposed Rule 2019—prices can usually be easily determined by reference to numerous readily available pricing sources, including TRACE quotes on Bloomberg screens for bonds and many popular loan pricing services. Requiring such disclosure by members of every group is detrimental and unnecessary.

It is well established that the price paid for a Bankruptcy Claim—whether par or pennies on the dollar—bears no legal or practical relevance to how it should be treated in the debtor's

[1] Credit default swaps for which the debtor is the referenced entity typically are closed out through an auction within thirty days of the petition date. Thus, the credit default swaps do not play any direct role in the bankruptcy case; to the extent a party to a credit default swap takes physical delivery of a claim against the debtor through the auction, that claim would be a disclosable economic interest.

bankruptcy. Perhaps more importantly, if pricing disclosures under Proposed Rule 2019 are mandatory, then holders of Bankruptcy Claims would be discouraged from working together and playing active and beneficial roles in chapter 11 restructurings. That result would severely damage the chapter 11 restructuring process.

One of the fundamental policies of the chapter 11 process is to provide maximum distributions to creditors by preserving the going concern value of an enterprise. The plan process furthers these policies by favoring a collective effort, requiring the debtor to build consensus among its key creditors and other parties in interest for a business plan and proposed restructuring. The Bankruptcy Code promotes and rewards negotiation among creditor and shareholder groups as a means for achieving the desired goals.

While other significant, deleterious effects may ensue if *ad hoc* groups no longer participate in chapter 11 restructurings, perhaps the greatest concern is that debtors in many cases would be deprived of a partner with whom to negotiate. While in simple bankruptcy cases the statutory creditors' committee may serve as the only necessary negotiating counterparty, in cases with more complex capital structures, *ad hoc* groups of holders commonly play active roles, thereby permitting the debtors' discussions to result in a plan of reorganization that should receive sufficient support for confirmation.

If debtors lose *ad hoc* groups as negotiating counterparties, they will find it much more difficult—and in some cases impossible—to resolve the case through a negotiated plan. The result may well be a more extended plan process while the debtor engages in a series of one-off negotiations, all the while incurring additional expense and exposing the enterprise to additional risk as it languishes in bankruptcy. This outcome—one that increases costs, reduces recovery to creditors, and threatens the prospects of enterprises continuing as a going concern—would frustrate fundamental policies of the bankruptcy process.

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In a previous letter submitted on November 30, 2007, the LSTA and SIFMA argued for the repeal of existing Rule 2019. The language of the present Rule has been construed to require—whenever a collection of holders satisfies the definition of a "committee" (an issue on which the courts have yet to come to a consensus)—each holder to disclose the price for its transactions in Bankruptcy Claims over the preceding year. In their 2007 letter, the LSTA and SIFMA expressed the concern that, following the *Northwest Airlines* decision, adverse parties—seeking to obtain negotiating leverage by virtue of their ability to injure the holders of Bankruptcy Claims by forcing them to disclose information that might reveal their proprietary trading strategies—would frequently demand those disclosures. The LSTA and SIFMA sought repeal of the rule so that litigation over Rule 2019 disclosures would not become a regular event in chapter 11 cases, increasing the expense associated with the process and introducing obstacles to the already challenging task of reorganizing a troubled business and preserving value.

Even so, many thoughtful participants in the bankruptcy process—including the Honorable Robert E. Gerber of the United States Bankruptcy Court for the Southern District of New York—took issue with the LSTA and SIFMA's proposed solution on the ground that a complete repeal of Rule 2019 would essentially throw out the baby with the bathwater. These observers made the point that certain disclosures remain necessary in bankruptcy and, in certain respects, the existing rule did not go far enough. At the same time, they also recognized the core point that led the LSTA and SIFMA to join in this debate—that the disclosure of pricing information was generally unnecessary and could in some circumstances be sought for purposes other than assisting the debtor in its efforts to emerge from bankruptcy, including in some instances for their own tactical purposes. (*See* Judge Gerber's letter of January 9, 2009, at 7 ("And in most cases, what they paid for their claims (and how much profit they will make as a consequence of intercreditor negotiations, or various case outcomes) will be a matter of indifference to the Court, and will not require disclosure.")).

The LSTA and SIFMA have taken these thoughtful comments to heart. Accordingly, while the original letter served its purpose of generating a lively debate about the role of Rule 2019 and the potential it creates for mischief, the LSTA and SIFMA no longer argue for the repeal of Rule 2019. Rather, the LSTA and SIFMA respectfully request that Proposed Rule 2019 be modified to eliminate the requirement for pricing disclosures (including the requirement to disclose the dates of a purchase or sale). The LSTA and SIFMA also suggest certain additional edits (with supporting comments) to Proposed Rule 2019 to better effectuate its purpose.

The LSTA and SIFMA

The Loan Syndications and Trading Association is the trade association for all segments of the corporate loan market. With more than 300 members, including broker-dealers, commercial banks, investment banks, mutual funds, merchant banks, fund managers, and other major financial organizations worldwide, the LSTA undertakes a wide variety of activities to foster the development of policies and practices designed to facilitate loan origination and the purchase and sale of loans in the secondary markets. Since 1995, the LSTA has developed standardized practices, procedures and documentation to enhance efficiency, transparency and certainty in the loan market. Additional information about the LSTA may be found at www.lsta.org.

The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while reserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, DC, and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA is available on its website at www.sifma.org.

The LSTA and SIFMA have solicited the views of their membership, parties who regularly participate, either on their own or through unofficial *ad hoc* groups of holders of Bankruptcy Claims, in chapter 11 cases filed by the issuers of those economic interests.[2] Any amendment to Rule 2019 will be closely studied by the membership, as well as other market participants, practitioners and academics alike—and will likely have far-reaching implications for the future of trading of Bankruptcy Claims. By this submission, the LSTA and SIFMA seek to participate in the amendment process with due regard for the proper and efficient functioning of the chapter 11 process and the financial markets for trading Bankruptcy Claims.

POINT 1 PRICING INFORMATION (INCLUDING THE DATE OF PURCHASE OR SALE) IS IRRELEVANT TO THE BANKRUPTCY PROCESS AND DISCLOSURE IS THUS UNNECESSARY

The price that any holder paid for its Bankruptcy Claim is not legally relevant to the treatment of that position in a bankruptcy case or the holder's status as a creditor or interest

[2] The membership of course is comprised of many institutions that have different perspectives and hold a range of views on the issues under discussion. The LSTA and SIFMA's positions herein represent a synthesized majority view of the membership, not attributable to any one institution (and indeed, one or more individual members may dissent from the LSTA and SIFMA's position on any given issue).

holder. The value of a Bankruptcy Claim is determined by the nature of the debtor's obligation under the instrument—not by the price paid for that instrument. It is well established law that the consideration paid for a Bankruptcy Claim does not affect the treatment of the holder's Bankruptcy Claim, the measure of the holder's participation in the bankruptcy, or the holder's voting power. Hon. Robert D. Drain & Elizabeth J. Schwartz, *Are Bankruptcy Claims Subject to the Federal Securities Laws?*, 10 Am Bankr. Inst. L. Rev. 569, 575 n.31 (2002) ("[A] discounted purchase price is irrelevant to the ability to enforce the claim in full.").[3]

Of critical importance, the disclosure of the trade date also immediately and quite easily discloses the price paid. In the efficient market for trading Bankruptcy Claims, market players have access to essentially real time information concerning the price bid by potential buyers, asked by potential sellers, and paid in recent transactions (though the identity of the buyer and seller is not disclosed) for both bank debt and bond debt.[4] Given the widespread availability of that information, once the date of a given trade is disclosed, any market participant can determine the price paid in the trade. Thus, participants in the bankruptcy process should likewise not be required to disclose the date upon which they purchased or sold their Bankruptcy Claims, as that would be an indirect means of disclosure of pricing information.[5]

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[3] *See also Stockholders' Protective Comm. for Moulded Prods., Inc. v. Barry (In re Moulded Prods., Inc.)*, 474 F.2d 220, 225 (8th Cir. 1973); *In re Pittsburgh Rys. Co.*, 159 F.2d 630, 632 (3d Cir. 1947); *In re Lorraine Castle Apartments Bldg. Corp.*, 149 F.2d 55, 57-58 (7th Cir. 1945); *Mokava Corp. v. Dolan*, 147 F.2d 340, 344-45 (2d Cir. 1945); *Standard Gas & Elec. Co. v. Deep Rock Oil Corp.*, 117 F.2d 615, 619 (10th Cir. 1941); *Texas Hotel Sec. Corp. v. Waco Dev. Co.*, 87 F.2d 395, 399 (5th Cir. 1937); *Sec. First Nat'l Bank of Los Angeles v. Rindge*, 85 F.2d 557, 561 (9th Cir. 1936); *Fairfield Executive Assocs. v. Hyperion Credit Capital Partners (In re Fairchild Executive Assocs.)*, 161 B.R. 595, 602 (D.N.J. 1993); *In re Automatic Equip. Mgf. Co.*, 106 F. Supp. 699, 705-06 (D. Neb. 1952); *In re V-I-D, Inc.*, 101 F. Supp. 71, 75 (N.D. Ind. 1951); *In re Util. Power & Light Corp.*, 29 F. Supp. 763, 770 (N.D. Ill. 1939); *In re Indiana Cent. Tel.*, 24 F. Supp. 342, 344 (D. Del. 1938); *In re Oaks Partners, Ltd.*, 141 B.R. 453, 460 (Bankr. N.D. Ga. 1992); *In re Executive Office Ctrs., Inc.*, 96 B.R. 642, 649-50 (Bankr. E.D. La. 1988); *In re W.T. Grant Co.*, 4 B.R. 53, 77 (Bankr. S.D.N.Y. 1980).

[4] The price of bond debt can be determined by TRACE quotes on Bloomberg screens; the price of bank debt is available from many popular loan pricing services. While prices of trade claims are not readily available from electronic pricing services, those claims form a very small subset of the Bankruptcy Claims at issue. Moreover, the holders of those claims are much less likely to form groups and contest matters before the court.

[5] The LSTA submitted an additional presentation explaining in detail the relationship between trade dates and prices with its letter dated January 20, 2010.

POINT 2 REQUIRING EXTENSIVE DISCLOSURE OF TRADING HISTORIES IN ALL CIRCUMSTANCES PROVIDES NO LEGITIMATE BENEFIT

Beyond the undeniable proposition that trading histories are legally irrelevant, requiring extensive disclosures of pricing (and timing) information of historic purchases and sales of Bankruptcy Claims yields no benefit to the bankruptcy process. So long as information concerning the quantum of an informal group's holdings in the aggregate as well as each individual member's net "long" position are made available, the debtor and other parties in interest will have more than adequate information to understand how loud that group's voice may loom in the restructuring process and the relative impact of each individual holder. In most cases, requiring further disclosure serves no legitimate purpose. Indeed, since the decision in *In re Northwest Airlines Corp.*, 363 B.R. 704 (Bankr. S.D.N.Y. 2007)—the decision that gave rise to the present debate concerning more expansive disclosure—parties have at times not used Rule 2019 for the purpose of obtaining relevant information, but rather, as the Honorable Robert E. Gerber explained in his letter of January 9, 2009, at 6, "to advance private agendas of their own (such as to torment their opponents, or to get bargaining leverage)."

Moreover, if Proposed Rule 2019 is enacted with a qualified right to pursue disclosure of historical trading prices—Proposed Rule 2019 currently states that such pricing disclosures should be made as "directed by the court"—then bankruptcy courts will endure a flood of these motions. The language in Proposed Rule 2019 is an open invitation for parties to make those requests. Demands for proprietary information will only be met by contests, not compromise. Indeed, as demonstrated in the short period since the original *Northwest Airlines* decision, parties have been consuming an ever increasing amount of time, money and judicial resources fighting these battles before bankruptcy courts in numerous cases. The LSTA and SIFMA thus submit that any revised rule should drop altogether the concept of disclosing historic trading dates and prices.

Nevertheless, one can imagine highly unusual circumstances where the price of a purchase or sale or the transaction date might indeed be relevant to some issue in the case. For example, in the *Papercraft* bankruptcy case, the bankruptcy court found that pricing information was relevant where ***an insider of the debtor*** secretly purchased claims at a discount, voted those claims to block the debtor's plan, coerced the debtor to file another plan, and consequently delayed the final disposition of the case. *See In re Papercraft Corp.*, 187 B.R. 486 (Bankr. W.D. Pa. 1995), *rev'd and remanded*, 211 B.R. 813 (W.D. Pa. 1997), *aff'd and remanded*, 160 F.3d 982 (3d Cir. 1998), *on remand*, 247 B.R. 625, 629-30 (Bankr. W.D. Pa. 2000). In those circumstances (and as happened in *Papercraft*), routine discovery is more than sufficient to uncover the necessary information. A blanket rule that compels disclosure in all cases is wholly unnecessary to address this atypical situation.

Indeed, reliance on the adversarial system—in which parties with an economic stake seek to take discovery to protect their legitimate interests—is preferable to a court-directed rule for two reasons. First, traditional discovery methods afford protections for the producing party, which may be heard on objections to the relevance and scope of discovery. A judge—taking into account the facts of the particular case—then determines whether the requesting party is entitled to the information it seeks. Second, in the event that a judge allows discovery, only the party seeking the information has access to it; it is not publicly filed for the world to see, and often confidentiality is enforced through a protective order. These protections provide limits on the utility of seeking disclosure as a litigation tactic, which will also discourage any illegitimate use. A blanket rule that compels public disclosure in all cases is wholly unnecessary to address the atypical situation where price could potentially be relevant, particularly where there exists a method of obtaining such information that addresses and balances the concerns of all parties.

Finally, if the court itself had questions about a party's bonafides that called for reviewing pricing information, then it could order a party to provide that information under terms the court sees fit. The rule does not need a separate recognition of a court's ability to obtain disclosure, as it inherently possesses the power to make these inquires. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991) (discussing the inherent powers of the federal courts, including "the power to conduct an independent investigation in order to determine whether it has been the victim of fraud.") (internal citation omitted); *In re Downs*, 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.").

For all these reasons, Proposed Rule 2019 should be modified to remove open invitations for parties in interest to bring collateral litigation to obtain historic pricing information.

POINT 3 REQUIRING DISCLOSURE OF PRICING INFORMATION WILL DRIVE PARTIES FROM THE RESTRUCTURING PROCESS

Participants in postpetition trading markets consist primarily of sophisticated investors who make decisions to buy or sell Bankruptcy Claims based on highly confidential and proprietary analyses. They regularly devote substantial time and expense to understanding in excruciating detail all facets of a debtor to discern how the credit might perform in the future. Through this exercise, market participants develop comprehensive and sophisticated views concerning the risk for downside depreciation of the given Bankruptcy Claims versus the potential for future upside. If Proposed Rule 2019 is enacted in its present form, these regular players likely would choose not to participate in *ad hoc* groups, thereby introducing significant problems for the restructuring process.

For each market participant, its risk/reward investment analysis yields an eminently proprietary piece of information: the particular narrow price range at which it will buy (or, alternatively, sell) the Bankruptcy Claims. In the crowded field of competitors, the difference between those that succeed, those that struggle, and those that fail results from the differing abilities to determine the optimum price for a given transaction and the ability to buy at such price, ***before*** the price runs away from, and beyond, the analytically-derived extremely disciplined purchase price range of the market participant. Funds that focus on Bankruptcy Claims, like other categories of investment funds, are of course judged by their net annual investment returns, among other factors, by institutional investors allocating money to that particular investment strategy. Those investors—including pension funds, endowments and foundations allocating hundreds of billions of dollars—compare those annual returns of the various large and small players in that category, so that any rule that would tend to homogenize such returns would harm the investment funds and their investors.

Once a market participant determines its price, it seeks opportunities to trade. ***Of critical importance, the trades remain anonymous.*** While the market learns almost immediately that a transaction occurred at a given price, the identities of the buyer and seller are not disclosed to the market. And with most types of Bankruptcy Claims—for example, bond debt or loans traded through a broker or an agent, as the case may be—even the buyer does not know (and never learns) the identity of the seller (and vice versa). Anonymity enables a market participant to then move quietly (which is especially important for larger participants), increasing or decreasing its position without disclosing to the rest of the market that its proprietary analysis has yielded an opportunity to buy or sell Bankruptcy Claims at a price deemed sufficiently attractive on a risk-reward basis.

Proposed Rule 2019 would upset this process because it will force market participants to disclose their price—the resultant product of their time and energy. Given how the markets work, the problems with pricing disclosure become obvious.

First, "copycat" players will immediately take advantage of that disclosure to profit from the hard proprietary work of others. Once copycats learn the price at which a reputable, well established and successful market participant bought or sold Bankruptcy Claims, they will then have the unearned benefit of all the analysis that went into generating that price point, at least up until the date of the trade. From there, with little analysis of their own, the copycats can adopt the strategy of the entity forced to make the disclosures, and take those opportunities for themselves. The loser, of course, is the market participant that put all the effort into analyzing and setting the boundaries on an appropriate purchase or sale price, as the copycats' transactions will sop up many of the market opportunities, which will quickly cause the market price to readjust. The ability of the disclosing market player to effectuate its proprietary strategy will be lost.

Next, competitors would then have a heightened appreciation for that participant's threshold for risk, upside recognition and downside tolerance. Looking through this window, they can then "reverse engineer" the underlying trading strategy based on the historical trading prices. Thus, not only do disclosures of price deprive the market participant of opportunities with respect to the given Bankruptcy Claims, but also they reveal an investment fund's underlying institutional risk/reward investment strategy and template. Those competitors would then hold an informational advantage, thereby undermining the ability of the disclosing holder—

particularly large holders—to compete on a level playing field in the market with those that maintain their strategies in confidence.

At bottom, the participant's investment strategy is more than just its stock in trade, it is its ***trade secret***. Indeed, even when market participants are working together in an *ad hoc* group, they do not share their various positions or the prices at which they purchased their respective positions with each other, but rather report confidentially to counsel, who then only disseminate an aggregate number to the members of the group and to the court. Most distressed debt investment funds refrain from timely disclosing even to their own investors their holdings, the size of their particular holdings and the purchase prices for those holdings, fearing that such disclosure could potentially be leaked to the full general market by a well-meaning but potentially careless investor. Sophisticated, reputable investment funds operate under great confidentially constraints, not to take advantage of others, but rather to retain the fruits of their labor.

If Proposed Rule 2019 is enacted in its present form, then market participants are likely to be less willing to participate in the restructuring process. Given the choice between disclosing their highly confidential and proprietary investment strategies, on the one hand, and not participating in the bankruptcy process via membership in an *ad hoc* group, on the other, many may choose either to remain completely silent or, for large holders, to speak only on their own behalf. And that result will threaten serious disruption of the otherwise well-balanced mechanisms of the chapter 11 process, since many participants—often the largest true economic stakeholders in a case—will decline to participate in *ad hoc* groups.

If that happens, small stakeholders will lose the opportunity to join a group and speak as part of a collective economic voice in the case. A market participant's willingness to spend the time and energy required to work through difficult (and often contentious) chapter 11 processes is a function of the price paid for such Bankruptcy Claims relative to the expected value of the return that such purchase will afford. As one would expect, small stakeholders, if each had no choice but to work independently, would typically not have the financial incentive or wherewithal to expend the time and money required to play a significant role in a debtor's reorganization process. If holders are reluctant to form groups because they do not wish to disclose their trading histories, then small stakeholders will not have any practical opportunity to join with others to share the costs of espousing common positions. That essentially leaves them on the sidelines, as they would have no cost-effective mechanism to participate in the bankruptcy process.

In addition, debtors may lose vital negotiating partners in the restructuring process. In most chapter 11 cases (i.e., cases with complex capital structures), the statutory creditors' committee is comprised of a wide cross-section of creditors, and thus cannot adequately advocate a position on behalf of any one constituency. In those instances, groups of holders of the debtor's various economic interests move to the forefront of the restructuring process. While the holders do not divulge to each other their trading histories and strategies, they do amalgamate into loosely held groups that effectively neutralize any real or perceived conflicts of interest between the various parties in interest. That economical and efficient *ad hoc* process—developed and refined through market forces—often provides the best means for organizing suitably cohesive groups of similarly situated holders to negotiate with debtors over the treatment of their Bankruptcy Claims. As Judge Sontchi recently recognized in denying a demand for disclosure under existing Rule 2019: "[T]his Court believes that there is nothing neither nefarious nor problematic, in and of itself, in disparate parties banding together to increase their leverage. Indeed, enabling such is one of the primary rationales for the existence of the Bankruptcy Code." *In re Premier Int'l Holdings, Inc.*, Case no. 09-12019, slip op. at 33 (Bankr. D. Del. Jan. 20, 2010). Without their participation, debtors will be forced to endure a time-consuming, expensive and intractable series of one-off negotiations with large individual stakeholders, thereby dramatically increasing costs and lengthening—and perhaps even jeopardizing—the reorganization process.

This splintered process will affect the proceedings in court as well. With *ad hoc* groups playing their role as it has come to be known, judges can hear a clear message from those that hold a large position in, if not substantially all of, a given claims pool. That sharpens the issues, focuses the proceedings, and often leads to a prompt resolution. Replacing that process with a jumble of disorganized parties pursuing one-off motions and arguments will not provide a benefit to the court's procedural harmony or substantive decision-making.

Finally, the restructuring process will suffer in other ways as well. When the market for Bankruptcy Claims is liquid, debtors that have improved their long-term prospects during their bankruptcy cases will see the prices of Bankruptcy Claims rise in response to the favorable news. Those higher prices will reflect increasing market confidence, which will help generate interest in exit financing, rights offerings and other such financial accommodations that lead to a successful reorganization—a fundamental purpose of the bankruptcy process. If the market for Bankruptcy Claims turns stagnant and illiquid, debtors will lose opportunities to communicate their turnaround to new investors, and certain critical roles in the restructuring process will go unfilled, diminishing the prospects for a successful exit.

For all the foregoing reasons, the LSTA and SIFMA thus request that Proposed Rule 2019 be modified to address these concerns.

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Alternative Draft

The LSTA and SIFMA propose the following revisions to Proposed Rule 2019. For revisions not related to the points above, further explanatory comments are provided below.

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) DEFINITION. In this rule

"disclosable economic interest" means those economic interests in relation to the debtor under the management and control of the business unit at the entity that renders the entity subject to this Rule;

"~~disclosable~~ economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest; and *[comment 1]*

"derivative instrument" means a derivative contract referencing the debtor alone, other than a derivative contract owned or held by, or within the control of, the entity (or an affiliate thereof) from which disclosure is sought in its capacity, or in the course of its functioning as, a market maker in respect of such derivative contracts. *[comment 2]*

(b) DISCLOSURE BY ENTITIES, GROUPS, COMMITTEES, INDENTURE TRUSTEES, AND OTHER PARTIES IN INTEREST. In a chapter 9 or 11 case, every entity, group, or committee, as to each, *[comment 3]* that consists of or represents more than one creditor or equity security holder (other than (i) a financial institution in its capacity as an agent under a credit agreement or similar financial accommodation contract; *[comment 4]* (ii) one or more funds represented by the same or an affiliated investment manager; and (iii) two or more affiliated creditors) *[comment 5]* and, unless the court directs otherwise, every indenture trustee, shall file a verified statement setting forth the information specified in subdivision (c) of this rule. On motion of a party in interest, or on its own motion, the court may also require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) the employment of the entity or indenture trustee, including the name of each entity at whose instance the employment was arranged; or

(B) in the case of a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act;

(2) if not disclosed under subdivision (c)(1), with respect to the entity or indenture trustee, and with respect to each member of the group or committee:

(A) name and address; and

(B) the nature and amount of~~, and if directed by the court, the amount paid for,~~ each disclosable economic interest held in relation to the debtor as of the date the entity, group, committee, ~~was employed, the group or~~

~~committee was formed,~~ or the indenture trustee appeared in the case; *[comment 6]*~~, and~~

(C) ~~the date when each disclosable economic interest was acquired, unless acquired more than one year before the petition was filed;~~

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by the entity, group, or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, or by the indenture trustee:

(A) name and address; <u>and</u>

(B) the nature and amount of~~, and if directed by the court, the amount paid for,~~ each disclosable economic interest held in relation to the debtor as of the date ~~of the statement~~ <u>the entity, group, committee, or indenture trustee appeared in the case</u>; and

~~(C) the date each disclosable economic interest was acquired, unless acquired more than one year before the petition was filed; and~~

(4) a copy of the instrument, if any, authorizing the entity, group, committee, or indenture trustee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. <u>Any entity, group, committee or indenture trustee that has filed a verified statement pursuant to this rule shall supplement such statement when necessary so that the information on file with the court is correct at the time such entity, group, committee or indenture trustee files any motion, objection or other paper with the court or participates in oral argument before the</u>

court. ~~A supplemental verified statement shall be filed monthly, or as the court otherwise orders, setting forth any material change in facts contained in a statement previously filed under this rule., including information about any acquisition, sale, or other disposition of a disclosable economic interest by the entity, members of the group or committee, or the indenture trustee.~~ *[comment 7]*

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS

(1) On motion of any party in interest, or in its own motion, the court may determine~~:~~

(A) whether there has been any failure to comply with the provisions of this rule.~~;~~

~~(B) whether there has been any failure to comply with any other applicable law regulating the activities and personnel of any entity, group, committee, or indenture trustee; or~~ *[comment 8]*

~~(C) whether there has been any impropriety in connection with any solicitation.~~ *[comment 9]*

~~(2) In making a determination under subdivision (e)(1), the court may examine:~~

~~(A) any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, deed of trust, or authorization to act as a representative; and~~

~~(B) any disclosable economic interest acquired by any entity, group, committee, or indenture trustee in contemplation of or in the course of a case.~~ *[comment 10]*

~~(3)~~(2) If, under subdivision (e)(1), the court determines that a failure to comply ~~or an impropriety~~ *[comment 11]* has occurred, it may:

(A) refuse to permit the entity, group, committee, or indenture trustee to be heard or to intervene in the case; or

~~(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, committee, or indenture trustee; or~~ *[comment 12]*

~~(C)~~(B) grant other appropriate relief.

COMMENTS

Comment 1—The definitional structure of the rule is expanded to recognize that separate functioning business units might exist within the same legal entity and may be on different sides of ethical walls (e.g., public and private side desks). The disclosing party only needs to disclose those economic interests in the debtor that the business unit manages or controls.

Comment 2—Proposed Rule 2019 should not be so far reaching as to compel disclosure of an entity's derivative positions when such positions have no material bearing on the entity's voice in the restructuring process (or that of the collective of which such entity may form a part). The proposed definition of "derivative instrument" should exclude (a) portfolio derivative trades (by including only those trades referencing the debtor alone) and (b) derivative positions held in an entity's capacity as market making intermediary. Portfolio derivative trades express a counterparty's view regarding a market sector rather than any one debtor and provide extremely limited exposure to any one name in the portfolio. As a result, disclosures with respect to these instruments would offer little insight into a counterparty's recovery expectations as against the debtor. Disclosure of derivatives positions held in an entity's capacity as market making intermediary is similarly incongruous with Rule 2019 policy, as they concern the market making activity itself rather than any recovery motive as against the debtor.

Comment 3—The proposed language "as to each" should be added to make clear that the subsequent phrase, "that consists of or represents more than one creditor or equity security holder," modifies each of the terms "entity," "group" and "committee."

Comment 4—The proposed language should be added to make clear that agents are not subject to the disclosure obligations under this rule that are otherwise reserved for those that represent more than one creditor or equity security holder. Agents generally lack the authority to compel disclosure by the lenders, and disclosure of institutional holdings of the agent would be both overbroad and potentially misleading. Because the lenders generally act through the decision of "required lenders" (frequently defined as a majority), not through the agent acting on its own, the positions held by the agent itself will not be informative. Agents, in their individual capacities, however, are not exempted from the last sentence of this section, and thus, as with any party in interest, may have to make disclosures as ordered by the court.

Comment 5—The proposed language should be added to make clear that affiliated entitles, either acting for themselves or through an affiliated asset manager, are not subject to the disclosure obligations under this rule that are otherwise reserved for those that represent more than one creditor or equity security holder. The disclosure obligations imposed on members of a "group" should not be triggered merely because a fund holds its Bankruptcy Claims in two or more separate vehicles, or uses a separate vehicle to manage the investments. Those entities, in their individual capacities, however, are not exempted from the last sentence of this section, and thus, as with any party in interest, may have to make disclosures as ordered by the court.

Comment 6—The proposed change would simplify the timing of the first disclosure by requiring any entity, group, committee or indenture trustee to make its disclosures required by the rule upon first appearing in the case.

Comment 7—The proposed change should be made to ensure that updated information is on file with the court at any and all times that an entity, group, committee or indenture trustee seeks to participate in matters before the court. It also would alleviate the administrative burden of requiring ongoing monthly updates from any entity, group, committee or indenture trustee that is no longer active in the case.

Comment 8—Paragraph B should be deleted for two reasons. First, it is unnecessary, given that the "other applicable law" referenced in the rule would have its own means for enforcement. Second, the rule could be read as an improper attempt to expand the jurisdiction and mission of bankruptcy courts to hear disputes under such "other applicable law"—for example, securities laws and regulations that regulate market players, or banking laws and regulations that regulate financial institutions.

Comment 9—Paragraph C should likewise be deleted as unnecessary and possibly providing for activities by bankruptcy courts that would fall outside their jurisdiction. Solicitation by a non-debtor to act on behalf of another non-debtor would be governed by applicable non-bankruptcy law, presumably state laws concerning

contract, misrepresentation and fraud. Disputes of that nature should be resolved under those well-known legal principles. In addition, bankruptcy courts should hear those disputes only if the disputes fall within the bankruptcy courts' jurisdiction, and abstention is not otherwise applicable. Resolution of those questions should be left to existing legal principles and standards.

Comment 10—Subsection 2 should be deleted as unnecessary and perhaps inconsistent with existing evidentiary rules. The ability of bankruptcy courts to examine documents or review other information to resolve a dispute is governed by the Federal Rules of Evidence and related evidentiary case law, rules and doctrines. Subsection 2 as written seems to invade that arena by expressly permitting bankruptcy courts to examine certain items. To the extent it is not redundant with existing evidentiary rules, it may prove inconsistent. The better course would be to use existing evidentiary rules with respect to any dispute concerning a failure to comply and appropriate sanctions.

Comment 11—This deletion would be necessary to conform to the deletion proposed by Comment 9.

Comment 12—Consistent with Comment 9, disputes over the propriety or validity of any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, committee, or indenture trustee should be resolved under existing legal principles and standards.

Conclusion

The LSTA and SIFMA respectfully request that Proposed Rule 2019 be revised as set forth herein.

Very truly yours,

THE LOAN SYNDICATIONS AND TRADING ASSOCIATION

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